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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 7

LOUIS JOSEPH ABBATE and MICHAEL LOUIS FALCONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners' Reply Brief

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ARGUMENT.

The government bases its argument on the theory that separable social interests are designed to be protected by the Illinois and federal statutes under which the petitioners have been convicted. Therefore, the government reasons, both Illinois and the United States may prosecute for a single transaction.

This separable social interest doctrine formulated by the government is that in this case each indictment had an essential substantive factor not present in the other, reflecting in each instance a peculiar and separate interest of the prosecuting sovereign. The government attempts to distinguish the Illinois crime of conspiracy from the federal crime of destroying a means of communication operated or controlled by the United States by contending that the Illinois crime is directed towards the preservation of private property while the federal crime is directed toward the prevention of acts of sabotage.

This argument ignores several important aspects of the case. Both prosecutions were for conspiracy. The gist of the crime of conspiracy under the laws of both Illinois and the United States is the agreement to do an illegal act or to do a lawful act by unlawful means. Thus the social interest which each sovereignty was actually protecting was that which forbids unlawful agreements.

A second aspect of the case, which is ignored by the government in its attempt to convey the impression that separable social interests are being protected, is found in the facts of the case itself which disclose no purpose for prosecution by the government other than an effort to punish for the attempt to destroy the property of the telephone companies involved.

The petitioners were jointly indicted with James Shelby and Charles Perry. The indictment arose out of activities connected with a strike by the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an International Representative of the Union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the government.

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. The four men met in Chicago where Shelby gave them plans of the various installations to be destroyed and instructions as to how to do it. After Shelby left Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the plan and that they were going to inform the telephone company in Chicago, which they did almost immediately. However, McLeod insisted on going to Mississippi to carry out Shelby's plan. The petitioners informed the telephone company officials of the plan and they called the matter to the attention of the Chicago Police Department. Thereupon the petitioners were arrested and brought to the office of the State's Attorney of Cook County, Illinois. Abbate and Falcone gave extensive information to the telephone company officials and to the State's Attorney's office. It was because of this information that the plan was brought to light and the prosecutions were instituted.

Abbate, Falcone, and Shelby were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company. The petitioners pleaded guilty to the crime of conspiracy, and received sentences of short terms in the County Jail of Cook County, Illinois; the indictment as to Shelby was dismissed. Only then were indictments returned in Mississippi against the petitioners, Shelby and Perry, charging the federal offense.

The federal indictment was, we believe, returned at the instigation of the telephone companies which sought retribution through the processes of the federal courts. Our belief is strongly supported by the facts and the attendant circumstances which are in the record of the case.

The government's chief witness, McLeod, who at the time of the trial was confined at Oklahoma State Penitentiary for armed robbery, agreed to testify for the government (R. 172) after he had been assured by the attorney for the Southern Bell Telephone Company that if he would help the telephone company by testifying for the government he would not be indicted (R. 175). Although he testified that the United States Attorney did not promise immunity to him, McLeod was not indicted.

Evidence introduced by the government demonstrated that only twenty out of twenty-four hundred circuits contained in the coaxial cable which the defendants allegedly sought to destroy were operated or controlled by the United States and that these circuits were, with varying degrees of frequency, serviced by the telephone companies. Thus in order to sustain the conviction, the government maintains that it may prosecute on the basis of the conspiracy to destroy twenty circuits while the State of Illinois may proceed on the basis of the conspiracy to destroy all the circuits contained within one coaxial cable.

The facts of the case demonstrate that there was no express intent, on the part of the petitioners, to commit sabotage against the United States. The Court of Appeals was forced to fall back on the highly fictional rule that the petitioners were bound by the knowledge of the co-defendants of the presence of twenty government circuits out of twenty-four hundred in the coaxial cable, and that conspirators are deemed to have intended the natural consequences of their conspiracy (*i.e.* the destruction of the government circuits). The operation and control of the means of communication by the United States when viewed in this light is seen only as an element which gives jurisdiction to the federal court but does not create a separate social interest.

To further illustrate our position we take the liberty of quoting from an article of Professor L. B. Schwartz which appeared in 13 Law and Contemporary Problems 64, 79. Professor Schwartz says:

> "* * * Attention and controversy tend to focus on the jurisdictional problem rather than the substantive issues of criminality. Federal Jurisdiction may turn on the distinction between transporting 'with fraudulent intent' and mailing "for the purpose of executing a scheme to defraud.' Courts find themselves (making) the oft-repeated declaration that the use of the mails is the 'gist' of the offense of mail fraud, when all that is meant is that this federal jurisdictional element must, of course be alleged and proved. To regard mailing as the essence of mail fraud is like treating the localization of the offense in Pennsylvania as the gist of a Pennsylvania prosecution for larceny.
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> * * *
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> "Against such a background it is not surprising that a foreign court should be misled regarding the nature of our federal penal law, to an utterly impractical result. In *Re Lamar* [Western Weekly Report 471, 477 (Supreme Court of Alberta 1940)]. The Supreme Court of Alberta refused an American request for extradition for mail fraud, on the ground, among others that the offense was not within the extradition treaty. The treaty did cover fraud and false pretense, and a request by the governor of a state for Lamar's extradition would have been honored. But since the national government wanted him for an offense the gist of which was mailing, the court could find no basis for giving him up, under the principle of international extradition law that the offense must be punishable in the asylum state. Mail fraud (like other federal offenses defined by reference to particular jurisdictional features) is a unique American penological phenomenon."

The substantive crime which the conspiracy in the present case allegedly sought to accomplish is but one of a grouping of crimes in Chapter 65 of Title 18 of the United

States Code (which title is in itself positive law under Act, June 25, 1958, c. 645, 62 Stat. 683) entitled "Malicious Mischief." The statute creating the crime was originally enacted during the Civil War to prevent sabotage of telegraph lines. However, the primary use made of this section today, and especially in this case, has been to give the federal courts jurisdiction in cases of malicious mischief against telephone and similar communication companies. This crime invokes what is sometimes called the auxiliary jurisdiction of the federal courts and is for the purpose of imposing the sanctions of the federal government against those who would commit malicious mischief against telephone lines and other communication systems. As such, it may be grouped with such crimes as being a fugitive from justice, robbing a federally insured bank or savings and loan company, kidnapping or transporting a stolen car across a state line. All of which laws were enacted with the purpose in mind of complimenting and supplementing the states in the enforcement of their own laws. There are therefore no real "separable social interests" involved in this case. The element of operation of control of the means of communication by the United States is merely a jurisdictional element which the government must prove beyond all reasonable doubt just as any state prosecutor must prove beyond all reasonable doubt that the courts of his state have jurisdiction of the offense.

The government further contends that the result which we seek in this case precludes federal enforcement of federal law. However, the remedy does not lie in the subjection of the accused to two or more prosecutions. The government could have prosecuted first. Further remedy lies in the prohibition by the Congress of the enforcement of the state law enforcement program which endangers the federal program. *Commonwealth of Pa. v. Nelson,* 350 U.S. 497. If the Congress determines that a state law enforcement program constitutes a hindrance to federal law en-

forcement, it may pre-empt the field and prohibit state action.

The double prosecutions in this case constitutes a basic injustice which this court should prohibit through the use of its supervisory powers. The government attempts to dismiss our contention that this court has the supervisory powers which can be exercised to prevent double prosecutions on the theory that there is no constitutional mandate upon which the exercise of those powers may be based. We do not believe that the government's position is well taken. Unlike the petitioner in *Bartkus* v. *Illinois*, Case No. 1, October Term, 1958, we are not confronted with the problem of due process of law. Double jeopardy is expressly prohibited the federal government by the Fifth Amendment. Resolution of the problem before the Court depends on the definition of the term "double jeopardy" or as the rule is stated in the Fifth Amendment "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This provision is but a codification of the common law rule which was in effect at the time of the adoption of said amendment. The maxim as stated by Lord Coke (5 Coke 61a) is *nemo debit bis vexari pro una et eadem causa.* The key word we believe is *vexari.* This word may be translated as vexed, troubled or harassed. Traditionally, the gist of double jeopardy and the evil sought to be cured is the harassing of a defendant, the repeated prosecution in separate actions of a single person for the same transaction.

While the government and this court have spoken of the "price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments, * * *" (*Knapp* v. *Schweitzer*, 357 U.S. 361, cited on page 38 of the government's brief) we do not

believe that such a doctrine should be extended in such a manner as would subject men to double punishment and the harassment of defendants by the government, contrary to the letter and spirit of the Constitution.

The recently decided case of *Gore* v. *United States,* 357 U.S. 386, upon which the government relies in the present case is clearly distinguishable in that it is an example of non-harassing prosecution for several breaches of several statutes. There the government declined to prosecute by several indictments but placed in one indictment several counts each alleging a separate breach of statute. The defendant there was able to marshal his resources and defend himself in one action.

The present case demonstrates a harassing action on the part of the prosecution. The petitioners were forced to defend themselves not once but twice, to marshal their resources not once but twice. Indeed, the second prosecution was commenced in a district several hundred miles from the place where the petitioners reside and where the first prosecution occurred.

We submit that there is a clear and express constitutional mandate forbidding the prosecution by the federal government of a person convicted in the courts of a state for what is in reality the same crime. This court should take such action as is necessary to prevent the violation of that mandate and to establish the proper standards for the enforcement of the federal criminal law in the federal courts. (*McNabb* v. *United States,* 318, U.S. 313, 341)

CONCLUSION.

For the above and foregoing reasons and for the reasons advanced in the Brief of Petitioners, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit in this cause be reversed.

Respectfully submitted,

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